

Decision 02-07-045

July 17, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into NOS COMMUNICATIONS, INC. (U-5251-C), dba International Plus, O11 Communications, Internet Business Association (INETBA), I-Vantage Network Solutions; AFFINITY NETWORK, INC. (U-5229-C), dba QuantumLink Communications and HorizonOne Communications; and the corporate officers of NOS or ANI, to determine whether they have violated the laws, rules, and regulations governing the manner in which California subscribers are solicited, switched from one presubscribed carrier to another, and billed for telephone services.

I.02-05-001
(Filed May 2, 2002)

In the Matter of the Application of Blue Ridge Telecom Systems, LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resold Local Exchange Services Within California.

A.01-12-013
(Filed December 10, 2001)

**ORDER MODIFYING AND DENYING REHEARING
OF INVESTIGATION (I.) 02-05-001, AS MODIFIED**

I. INTRODUCTION

On May 2, 2002, we issued Order Instituting Investigation (I.) 02-05-001 (“OII”), to determine whether the following parties were engaged in deceptive marketing, slamming and cramming: NOS Communications, Inc. (“NOS”), dba International Plus, O11 Communications, Internet Business Association, I-Vantage Network Solutions; Affinity Network, Inc. (“ANI”), dba QuantumLink Communications and HorizonOne Communications (ANI); and each and every

person owning, controlling, operating, or managing NOS, ANI, and their respective dba's (collectively, "Respondents").

In the OII, we also permitted Staff to continue discovery and continue to investigate the practices of the Respondents. (I.02-05-001, p. 8.) Further, we ordered the Respondents in the OII to provide responses to specific discovery requests, entitled "OII Data Requests," that were attached to the OII. (I.02-05-001, p. 8.)

Blue Ridge Telecom Systems, LLC ("Blue Ridge") filed Application (A.) 01-12-013, for a certificate of public necessity and convenience ("CPCN") to provide facilities-based and resold competitive local exchange services within California. (A.01-12-013, p. 1) In the OII, we observed that according to the Consumer Service Division ("CSD"), Blue Ridge is "operated and controlled by the same individuals who manage [NOS and ANI]," and that Blue Ridge "appears to be an extension of the Respondents' business purposes and the two entities are integrally related." (I.02-05-001, p. 7.) Accordingly, we believed that there are common issues of fact and law in the OII and A.01-12-013, and thus, provided for the consolidation of the two proceedings, which would include consideration of Blue Ridge's fitness for obtaining a CPCN. (I.02-05-001, p. 7.)

On April 30, 2002, Blue Ridge filed a notice of request for withdrawal of A.01-12-013. This was two days before the OII was issued. Subsequently, Blue Ridge filed on May 17, 2002 a withdrawal of this notice. This withdrawal was filed in both I.02-05-001 and A.01-12-013.

On May 28, 2002, Respondents timely filed an application for rehearing of the OII. In this rehearing application, they challenge the lawfulness of Ordering Paragraph No. 3, which requires the production of documents in response to data requests that are attached to the OII. Respondents request the deletion of this ordering paragraph because they claim that it unnecessarily and unreasonably precludes Respondents from seeking appropriate limitations and/or reasonable

protective arrangements concerning the scope of discovery and use of information obtained pursuant to those requests.

We have carefully reviewed each and every allegation raised in Respondents' application for rehearing. We are of the opinion that good cause does not exist for the granting of the rehearing application. However, we will modify the OII, in the manner specified below, to clarify matters related to the consolidation of the OII with A.01-12-013, including the status of Blue Ridge in this consolidated proceeding.

II. DISCUSSION

1. Respondents' request that Ordering Paragraph No. 3 be deleted or modified is denied.

In its rehearing application, Respondents argue that Ordering Paragraph No. 3, which requires Respondents to answer data requests that are attached to the OII, should be deleted. Although they are not challenging the authority of the Commission and Staff to obtain documents and information under Section 314 and other provisions of the Public Utilities Code, Respondents argue that the ordering paragraph has short-cut their ability to raise objections or to "seek reasonable and appropriate limitations on the use of the information." (Application for Rehearing, p. 2.) Respondents also assert that the adoption of the ordering paragraph was arbitrary and without basis, since there is no explanation as to why it is in the OII. (Application for Rehearing, p. 2.) Neither of these arguments have merit.

Ordering Paragraph No. 3 simply orders Respondents to respond to requests for information that the Commission and its staff has authority to request and review. (See Pub. Util. Code, §314, which permits the Commission "at any time, to inspect the accounts, books, papers, and documents of any public utility.") Moreover, the individual data requests are within the scope of the OII. Thus, Respondents allegation that the data requests are irrelevant is without merit.

Respondents assert that there is no explanation as to why the Commission adopted Ordering Paragraph No. 3. However, the purpose for this ordering paragraph can be found in Ordering Paragraph Nos. 5, 6 and 9. Ordering Paragraph No. 6 permits Staff to “continue discovery and continue to investigate the practices of the Respondents.” Further, this ordering paragraph permits Staff to present additional evidence bearing on the operations of the Respondents and its operations or practices.”(I.02-05-001, pp. 8-9 [Ordering Paragraph No. 6].) Ordering Paragraph No. 9 states: “To facilitate the completion of this investigation, and consistent with the provisions of Section 314, Respondents are ordered to preserve until further order by the Commission all Letters of Agency (LOAs), verification tapes, PIC dispute records, complaint information, and consumer complaints involving California consumers, whether in electronic or paper form.” (I.02-05-001, p. 9 [Ordering Paragraph No. 9].) Ordering Paragraph No. 5 permits the Staff to amend the OII “to add additional Respondents or to raise additional charges.” (I.02-05-001, p. 8 [Ordering Paragraph No. 5].) Therefore, these ordering paragraphs provide Respondents with an explanation for the basis for the adoption of Ordering Paragraph No. 3, which was clearly adopted to facilitate the OII. (See Order Instituting Investigation of America’s Tele-Network Corporation (Filed March 26, 1998) I.98-03-039, 1998 Cal. PUC LEXIS 30, at pp. *19 - *22 [Ordering Paragraph No. 2]; see also, Order Instituting Investigation into the Operations of Heartline Communications, Inc. (Filed April 10, 1996) I.96-04-024, 1996 Cal. PUC LEXIS 148, pp. *23 - *25 [Ordering Paragraph No. 2], whereby we have made similar specific requests for information at the time of issuance of the OII.)

Further, Respondents are wrong that Ordering Paragraph No. 3 precludes them from the normal discovery process or from seeking any appropriate protective arrangement for the information and documents produced. Nothing in the OII prevents Respondents from seeking resolution from the Administrative Law Judge or using the Law and Motion Process if there is a dispute regarding the data requests or if Respondents wish to seek an appropriate protective arrangement for the

information and documents requested in the data requests.¹ Thus, contrary to Respondents' assertion, due process has not been denied. Accordingly, Respondents request to delete or modify the OII is without merit.

Also, Respondents sought protection from disclosure and use of some of the information and documents requested in the data requests. On June 11, 2002, Respondents filed an emergency motion for protective order. (See generally, Emergency Motion for Protective Order, I.02-05-001, filed June 11, 2002.)² Thus, Respondents' assertion that Ordering Paragraph No. 3 precludes them from using the normal discovery process is inconsistent with their filing of this motion.

2. The OII will be modified to clarify matters related to the consolidation of this investigation with A.01-12-013.

In reviewing the OII, we observe that the order needs to be modified to clearly reflect the consolidation of the OII and A.01-12-013. We will order the modification of the caption in the manner set forth below. We also add the parties and other interested persons on the service list in A.01-12-013 to the service list for this consolidated proceeding.

Further, we observe that the OII is not as clear as it could be regarding whether Blue Ridge is a respondent or a party to the OII. We intended that Blue Ridge became a party to the OII when we consolidated the OII and the CPCN application. However, the language in the OII does not make this clear. Although Respondents and Blue Ridge are represented by the same attorney or attorneys from the same law firm, and appear to have received a copy of the OII, and have acted accordingly, the OII, for purpose of clarification, should be modified to expressly

¹ Prior to seeking such a resolution from the Commission, Respondents and Staff should meet and confer to try to resolve on their own any discovery dispute.

² There appears to be no indication that prior to the filing of the emergency motion, the parties met and conferred. Also, the motion was heard and denied by the Administrative Law Judge during the Prehearing Conference ("PHC") held on June 21, 2002. (See PHC Reporter's Transcript, pp. 8-14.)

state that Blue Ridge is a party, and to provide that it be formally served with a copy of the OII. Further, as part of this clarification, the original OII and the instant order which disposes of the rehearing application should be served upon all interested parties on the service list for A.01-12-013, as well as those on the service list for the OII.

III. CONCLUSION

For the reasons stated above, Respondents' Application for Rehearing of I.02-05-001 should be denied, and the OII should be modified to clarify matters related to the consolidation of this investigation with A.01-12-013.

THEREFORE, IT IS ORDERED that:

1. The caption shall be modified to read as follows:

Investigation into NOS COMMUNICATIONS, INC. (U-5251-C), dba International Plus, O11 Communications, Internet Business Association (INETBA), I-Vantage Network Solutions; AFFINITY NETWORK, INC. (U-5229-C), dba QuantumLink Communications and HorizonOne Communications; and the corporate officers of NOS or ANI, to determine whether they have violated the laws, rules, and regulations governing the manner in which California subscribers are solicited, switched from one presubscribed carrier to another, and billed for telephone services.

In the Matter of the Application of Blue Ridge Telecom Systems, LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resold Local Exchange Services Within California.

FILED
PUBLIC UTILITIES COMMISSION
May 2, 2002
SAN FRANCISCO OFFICE
I.02-05-001

A.01-12-013
(Filed December 10, 2001)

2. Ordering Paragraph No. 4 shall be modified to read as follows:

“This investigation is consolidated with A.01-12-013, the Application of Blue Ridge Telecom Systems, LLC, to operate as a facilities-based competitive local carrier. We do so to conserve Staff resources in addressing common issues of fact and law in the two dockets, and because the outcome of this Order will determine the fitness of the applicant in A.01-12-013. Thus, as a result of this consolidation, Blue Ridge Telecom Systems, LLC, and all other persons in A.01-12-013 are hereby made parties to this investigation.”

3. The following language shall be added at the end of Ordering Paragraph No. 12:

“Further, the Executive Director shall also cause this order to be served by certified mail upon Blue Ridge and by first class mail on all other interested persons on the service list for A.01-12-013.”

4. The Executive Director shall also cause this order to be served by first class mail upon those on the service list for I.02-05-001 and A.01-012-013.

5. The service lists for I.02-05-001 and A.01-12-013 are hereby consolidated into one list, which shall become the service list for the consolidated proceeding.

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6. Rehearing of I.02-05-001, as modified herein, is hereby denied.

This order is effective today.

Dated July 17, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners